FRONT Report LINE

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Miranda warnings cannot be 'delayed'

IN A CASE that the Missouri Supreme Court found troubling, the court suppressed a defendant's murder confession because police intentionally withheld *Miranda* warnings until they questioned her a second time.

In *State v. Seibert*, decided Dec. 10, 2002, the murder conviction was reversed and her confession suppressed because it was obtained illegally and in a direct attempt to avoid the *Miranda* requirements.

The interrogating officer testified he had been trained to use a two-step technique designed to elicit an initial confession before reading the *Miranda* warnings, with the idea that once the suspect confessed, she would repeat the confession following the *Miranda* warnings.

There was no dispute the defendant was under arrest and was interrogated when she first confessed. Thus, *Miranda* warnings are required. The investigator feared if he Mirandized the defendant, she might not volunteer information. He had been taught that suspects are more likely to confess the second time, even after *Miranda* warnings, once they have implicated themselves. The technique assumes the second Mirandized confession can be used because it comes after a *Miranda* warning.

This faulty advice apparently was given to officers based on a misinterpretation of a 1985 Supreme Court case, *Oregon v. Elstad*, 470 U.S. 298 (1985). The opinion held that police could use a Mirandized confession, even if the defendant made earlier statements before being given *Miranda* warnings, as long as the Mirandized

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Legislators debate 30-hour hold, Amber Alert, concealed weapons

30-HOUR HOLD TIME

HB 198 would extend the time that a suspect may be held without a warrant to 30 hours for any criminal offense. The House has perfected the bill.

AMBER ALERT

HB 185 and SB 30 would create a statewide Amber Alert program. The Department of Public Safety would administer the system and coordinate local law enforcement and Missouri broadcasters to implement the program.

Any agency that already has a program by Aug. 28 would be exempt. HB 185 also provides that any agency that chooses to develop a program after

Aug. 28 must follow these criteria:

- The alert only will be activated for persons whose disappearance poses a credible threat of immediate danger of serious bodily harm or death as

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'Operating' vehicle defined in DWI case

IN A MARCH 4 opinion that will help law enforcement stop impaired drivers, the Missouri Supreme Court has ruled that a drunken man passed out behind the wheel of his car with the engine running was operating his car under the definition of the law, and that it was proper for the Department of Revenue to suspend his license.

In *Cox v. Director of Revenue*, Judge Duane Benton wrote: "Cox meets the bright-line to operate a car, as he caused its motor to function. Once the key is in the ignition, and the engine is running, an officer may have probable cause to believe that the

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determined by local law enforcement.

- Will not be activated in custodial disputes unless there is a credible threat of immediate danger of serious bodily harm or death as determined by local law enforcement.
- Will be activated when there are sufficient details of an abduction that makes activation of the system useful.

The bills also would create an oversight committee to review the program and revise the alert criteria if needed. The Missouri Sheriffs' and Police Chiefs associations are represented on the committee.

CONCEALED FIREARMS

House Bill 349 et. al. would allow residents to apply to their sheriff for a permit to carry a concealed firearm. An applicant would have to meet several criteria to obtain a permit:

- Be at least 21 and a U.S. citizen.
- Have lived in Missouri for at least six months or be a military member, or spouse of a military member, stationed in Missouri.
- Not have been found guilty of, or currently charged with, a felony or firearm offense.
- Not have been found guilty in the past five years of a misdemeanor involving a violent crime or two misdemeanors involving alcohol-related driving offenses or drug possession.
- Not be a fugitive.
- Not be dishonorably discharged from the armed forces.
- Not have engaged in a pattern of behavior, documented in public records, that causes the sheriff to reasonably believe the applicant may endanger himself or others.
- Not have been adjudged mentally incompetent or released from a mental health center in the past five years.
- Not be the respondent in a valid full order of protection now in effect.
- Be fingerprinted and clear a criminal background check by the state and FBI.
- Comply with training requirements set forth in the bill.

The bill, which has been perfected by the House, also would restrict where the permit holder may carry a firearm.

MIRANDA: CONTINUED FROM PAGE 1

confession was voluntary.

Elstad does not authorize the intentional ploy to avoid the *Miranda* requirements in *Seibert*. *Elstad* holds that in some extraordinary circumstances, a confession following *Miranda* warnings will not be excluded because police received incriminating evidence before the suspect was Mirandized.

The Attorney General's Office has tried to determine the source of this unconstitutional interrogation technique. It does not appear this technique is taught by any certified police academy in Missouri, but has been taught by at least one outside training agency during courses in advanced criminal investigation.

> *Elstad* does not authorize police to intentionally withhold giving *Miranda* warnings to an arrested suspect so the suspect will "loosen up" and confess. The use of the second confession, after *Miranda* warnings, will not be permitted because it will be considered involuntary, which the Fifth Amendment prohibits.

All agencies are encouraged to inform their investigators and detectives that the technique has been soundly condemned by the Missouri Supreme Court.

OPERATE: CONTINUED FROM PAGE 1

person sitting behind the steering wheel is operating the vehicle. This is true even if that person is sleeping or unconscious."

Police found Steven Cox sleeping or unconscious in the driver's seat of a parked car with the motor running. He appeared drunk and tested .18 on a breath test.

After his license was suspended, Cox appealed to the circuit court, which ruled the Department of Revenue acted improperly. The AG's Office appealed that decision on behalf of the department and won.

In 1996, legislators amended the section of the law that defined operating a vehicle as "physically driving or operating or being in actual physical control of a motor vehicle" by removing the phrase "or being in actual physical control of."

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UPDATE: CASE LAW

EASTERN DISTRICT

VOLUNTARY INTOXICATION

State v. Donald Hefflinger
No. 80828
Mo.App., E.D., Jan. 28, 2003

In a prosecution for first-degree involuntary manslaughter, the court did not err in refusing the defendant's evidence of intoxication to allegedly disprove intent. When a defendant's state of mind is at issue, Missouri law does not allow consideration of voluntary intoxication to rebut the state's circumstantial evidence of intent. In other words, a defendant cannot claim he was too intoxicated to form the required mental state to kill.

SOUTHERN DISTRICT

CONTROLLED SUBSTANCES, POSSESSION

State v. Billy D. Smith
No. 25015
Mo.App., S.D., Feb. 19, 2003

In a prosecution for possession of a controlled substance, evidence of the street value of the cocaine was logically relevant on the issue of the appellant's knowing and intentional possession of the drugs and legally relevant in that its probative value outweighed its prejudicial effect.

INSTRUCTIONS, VOLUNTARY INTOXICATION

State v. Jeremiah V. Johnson
No. 24483
Mo.App., S.D., Feb. 4, 2003

The defendant argued the trial court abused its discretion in submitting the voluntary intoxication/drug use instruction, MAI-CR3d 310.50, to the jury because he claimed it directed the jury not to fully consider his defense that he had a pre-existing mental disease or defect that was triggered or released by ingesting LSD. Section 562.076.3 provides that where evidence has been presented that a person was in a voluntarily intoxicated or drugged condition, the jury shall be instructed that the evidence may not be used for the purpose of negating a mental state which is an element of the offense. Thus, the trial court was required by statute to give the voluntary intoxication/drugged condition instruction as set out in MAI-CR3d 310.50.

SUFFICIENCY OF EVIDENCE, SODOMY

State v. Randall Copeland
No. 24556
Mo.App., S.D., Jan. 29, 2003

There was sufficient evidence of the defendant's guilt of first-degree sodomy when a 9-year-old victim consistently told a DFS worker that the defendant touched him in "bad spots" – his "pee-pee" and "butt." He also stated the defendant touched his butt with his hand all of the time and this stung, that he rubbed his butt, and that he stuck drugs up the butt. The victim consistently used the term "butt" in reference to the defendant's and his own acts. Given all of the consistent statements, there was sufficient evidence of penetration of the victim's anus.

RELEVANCE, EVIDENCE OF FIREARMS

State v. Kenny V. Cofield
No. 24909
Mo. App., S.D., Jan. 3, 2003

Evidence of a replica firearm used by the appellant to threaten a young victim in a child molestation case was relevant evidence of the defendant's actions, despite the fact that the firearm was a non-firing replica and not capable of deadly use. Given that relevance and the fact that the jury knew it was not capable of deadly use, its admission was not unduly prejudicial.

AMENDED CHARGES

State v. David L. Turner
No. 24634
Mo.App., S.D., Jan. 23, 2003

The court did not err in permitting the state to file an amended information the morning of trial changing sale of cocaine to sale of marijuana and including allegations of prior drug and felony convictions. By proceeding to trial without objection, the defendant waived his right to object. In addition, the defendant was not unduly prejudiced by losing his defense - his actual defense that he was not the individual on the videotape making the sales was equally applicable to either charge.

WESTERN DISTRICT

SENTENCE ENHANCEMENT

State v. Joseph Grubb
No 60983
Mo.App., W.D., Feb. 18, 2003

There was no plain error in using a conviction from a court-martial to enhance a defendant's punishment as a prior offender under Section 558.016, RSMo 2000. As defined by Section 556.016, RSMo 2000, the court-martial conviction constituted a felony.

IDENTIFICATION EVIDENCE

State v. Jason L. Vaughn
No. 60781
Mo.App., W.D., Jan. 28, 2003

There was sufficient evidence of the defendant's identification following a photographic lineup. The defendant's claim that the photographic array was unduly suggestive because his image was dissimilar from the other photos was insufficient. All that is required is a reasonable effort to find individuals with similar physical characteristics. The detective testified he used photographs that matched the individual's "age, height, weight, facial hair, features, haircuts, so forth."

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UPDATE: CASE LAW

WESTERN DISTRICT

SEARCH WARRANTS

State v. David Willis
No. 60463
Mo.App., W.D., Feb. 18, 2003

An affidavit established probable cause sufficient to issue a search warrant where the affidavit supporting the warrant contained hearsay statements from an unknown number of unidentified police officers stating that Willis emitted an "aroma of alcohol," that he had been driving at an excessive speed, attempted to pass slower traffic by passing on the right shoulder of the highway, and lost control of the vehicle, which overturned, causing the death of a 9-year-old passenger. When the warrant is supported by probable cause, it is unnecessary to apply the good faith doctrine of *United States v. Leon*, 468 U.S. 897, 104 S.Ct. 3405, 82 L.Ed.2d 677 (1984).

The state failed to meet its burden of proving that Willis was driving with a suspended license when it failed to prove beyond a reasonable doubt that Willis was operating a vehicle on the highway with a suspended license on the date of the crash.

COMPETENCY, MENTAL EXAMS

State v. Derik Benjamin Yeager
No. 60866
Mo.App., W.D., Jan. 28, 2003

The trial court did not err in refusing to order a second mental examination to determine the defendant's competency to proceed to trial when the court erroneously took the position that only one mental exam could be ordered. Section 552.020.2 clearly provides for multiple mental exams and the failure to order a second mental exam can be a violation of due process.

The appellate court concluded that reasonable cause did not exist for the trial court to sustain motion or to doubt the defendant's competency to stand trial. In most cases, however, a criminal defendant is entitled to a second mental exam when the first one finds he is competent.

PREDATORY SEXUAL OFFENDER

State v. Ben T. Rogers
No. 59861
Mo.App., W.D., Jan. 28, 2003

There was sufficient evidence to prove the defendant's status as a predatory sexual offender under Section 558.018.5 when the state produced testimony from a previous victim that the defendant raped her in Fresno, Calif., on or about July 13, 1984. Section 558.018 requires that every fact essential to a determination that a person is a predatory sexual offender be proven beyond a reasonable doubt and the court did this.

REVERSAL, CELL PHONE IN PRISON

State v. Johnnie William
No. 60776
Mo.App., W.D., Jan. 28, 2003

The court reversed the defendant's conviction of possessing a dangerous item of personal property in a prison. A cell phone and charger were found in the defendant's cell.

The statute defines the item as "any gun, knife, weapon or other article of personal property ... which may be used in such a manner as to endanger the safety or security of the correctional center or as to endanger the life or limb of any employee of the center." Despite testimony that the phone could be a safety risk, it did not fit within the general prohibition under the statute.